

Fox Enterprises, Inc.  
d/b/a Las Vegas Lounge

RR49-05552

7023 Pendleton Pike  
Indianapolis, Indiana 46226

District 6

## **PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **I.**

#### **BACKGROUND OF THE CASE**

The Permittee, Fox Enterprises, Inc., d/b/a Las Vegas Lounge, 7023 Pendleton Pike, Indianapolis, Indiana 46226 (Permittee) is the holder of a type 210, Alcohol and Tobacco Commission (ATC) permit, permit #RR49-05552. The Permittee filed its 2001 renewal on August 14, 2001 and that renewal was assigned to the Marion County Local Board (LB) for hearing. The LB heard the renewal request on November 5, 2001, and on that same day, voted 3 – 0 to deny the renewal. The ATC adopted the recommendation of the LB on November 20, 2001, and denied the renewal.

The Permittee filed a timely notice of appeal and the matter was assigned to ATC Hearing Judge, Daniel M. Steiner (HJ). The HJ assigned the matter for hearing on March 15, 2002, and at that time, witnesses were sworn, evidence was heard and the matter was taken under advisement.<sup>1</sup> The Permittee was represented by Joseph F. Quill. There were no remonstrators. The HJ now submits his Proposed Findings of Fact and Conclusions of Law to the ATC for consideration.<sup>2</sup>

### **II.**

#### **EVIDENCE AT THE HEARING**

##### **A. WITNESSES**

---

<sup>1</sup> Permittee has operated in the interim on several 90 day extensions pursuant to IC 7.1-3-1-3.1, issued on January 23, 2002, April 30, 2002, July 30, 2002, October 30, 2002 and January 30, 2003.

<sup>2</sup> Effective January 6, 2003, Mark C. Webb replaced Daniel M. Steiner as Executive Secretary and Hearing Judge of the ATC. Prior to issuing these Proposed Findings of Fact and Conclusions of Law, HJ Webb has listened to the tapes of the Local Board hearing as well as the hearing held before HJ Steiner, and has reviewed all exhibits submitted at both hearings.

The following witnesses testified before the HJ at the hearing and offered the following evidence in support of the permittee

1. Delbert Drummond. Drummond testified that he had been working for the permittee as a part-time bartender, filling in only when a regular employee is ill or otherwise unable to work for the past approximately two (2) years. He was working during the evening of January 11, 2001 when members of the Indiana State Excise Police entered the establishment responding to a complaint that gambling machines were present on the premises. Drummond admitted that certain gambling machines were inside the premises on that evening, but initially denied that any payouts had been made. According to Drummond, the Excise police officers at the scene did not like the responses he gave to their questions and felt that he was not cooperating enough with them. They threatened to take him downtown for continued questioning unless he answered their questions as they wanted them answered. In an effort to appease the officers, Drummond stated that he had made certain payouts when in fact he had not. Drummond was told that the establishment had five (5) days in order to remove the offending machines. He then unplugged them, put them in the back room that same day. The following day, the devices were confiscated by the Indianapolis Police Department Vice Squad. Excise made a follow-up visit approximately two (2) weeks later and indicated satisfaction that the machines had been removed. Drummond was not present when the machines were confiscated but stated that he has been back to the Las Vegas Lounge and that the premises have been gambling machine-free since that time. Drummond denied any knowledge of pull-tabs at the location during the time he has worked there.
2. Thomas Fox. Fox, along with his brother, David, own Fox Enterprises, Inc., d/b/a Las Vegas Lounge. They have held the permit since approximately 1997.<sup>3</sup> Fox was not present for the January 11, 2001 gambling violation, but does recall an earlier similar incident which resulted in a “no finding” in favor of the permittee, although he had no recollection of the actual citation itself. He indicated that the offending devices had been removed and that they had never been replaced. He denied having any pull-tabs at his establishment. Fox testified that he had no other violations and was surprised that the local board did not renew his permit. He described his business as a small neighborhood bar with three (3) tables and approximately 15 barstools. It is not open late at night, and though it is Fox’s livelihood, it does not generate an extravagant living style.

#### B. EXHIBITS

The following exhibits were introduced at the appeal hearing by and on behalf of the permittee:

---

<sup>3</sup> Before to obtaining the permit, Thomas Fox leased the premises from the prior permit holder. Thus, according to Fox, he has been running the premises since approximately 1992.

1. Report of Permit Visit and Evaluation, dated January 11, 2001, showing a public nuisance violation for possession of gambling paraphernalia.
2. Summary of certain cases, including final disposition, wherein the violations found by the local board were alleged to be similar to the instant permittee, the local board recommended against renewal of permit, but in each instance the ATC allowed renewal of the permit in question. Said cases are:
  - a. Robert E. Kennington, Post #465  
3117 East 10<sup>th</sup> Street  
Indianapolis, Indiana 46201  
ABC #RC49-00089 (last known)
  - b. American Legion Post #497  
3011 Guion Road  
Indianapolis, Indiana 46222  
ABC #RC49-18209 (last known)
  - c. American Legion Post #495  
8725 East 39<sup>th</sup> Street  
Indianapolis, Indiana 46229  
ABC #RR49-15946 (last known)
  - d. Robert Kennington, Post #34  
6440 Westfield Boulevard  
Indianapolis, Indiana 46220  
ABC #RE49-19060 (last known)
  - e. Veterans of Foreign Wars, Post #2999  
3553 English Avenue  
Indianapolis, Indiana  
ABC #RC49-18208
3. Transcript of the November 5, 2001 hearing before the Local Alcoholic Beverage Board of Marion County recommending against renewal of the permit by a 3 – 0 vote.
4. Parties Agreed Judgment for violation which occurred on August 19, 1999, showing a deferred judgment with no finding because the officers involved in the August 19, 1999 violation were no longer with the State Excise Police.<sup>4</sup>

### III. FINDINGS OF FACT

1. The Permittee, Fox Enterprises, Inc., d/b/a Las Vegas Lounge, 7023 Pendleton Pike, Indianapolis, Indiana 46226 (Permittee) is the holder of a type 210,

---

<sup>4</sup> This Exhibit was admitted out of order as Exhibit 5 during the appeal hearing in this cause. There is no Exhibit 4.

- Alcohol and Tobacco Commission (ATC) permit, permit #RR49-05552. (ATC File).
2. Fox Enterprises, Inc., acquired the permit at issue on or about October 21, 1997. (ATC File).
  3. Thomas and David Fox have been the sole owners of permittee since October 21, 1997. (ATC File).
  4. On August 19, 1999, a notice of violation was filed against permittee for possession of gambling devices. However, the cause was disposed with no finding made against permittee because at the time of disposition, the officers involved with the alleged violation were no longer with the State Excise Police. (LB Hearing; ATC Hearing). This incident does not rise to the level of a violation of record with the ATC.
  5. On March 23, 2000, permittee was issued a warning for possessing gambling devices on the premises. This matter was unrelated to the August 19, 1999 incident. (LB Hearing), and does not rise to the level of a violation of record with the ATC.
  6. On January 11, 2002, permittee was issued a violation for possession of gambling devices as a public nuisance. (LB Hearing; ATC Hearing).
  7. Permittee has only one gambling violation of record, namely, the January 11, 2001 violation for possessing gaming devices.
  8. Permittee claimed that the Marion County LB's refusal to renew its permit constituted an unlawful application of the "two strikes" policy in violation of the Marion County LB in violation of the *Ind. ABC v. Osco Drug*<sup>5</sup>. However, because the HJ finds that permittee has only one violation of record for illegal possession of gaming devices, it is unnecessary to address that argument. (ATC Hearing).
  9. Permittee's January 11, 2001 violation of record for possessing gaming devices is insufficient in itself, to deny renewal of this permit.
  10. Thomas Fox's testimony at the LB hearing, as well as at the appeal hearing shows that permittee understands the seriousness of the offense for which a violation of record was found, and that denying renewal of the permit under the facts presented here would be excessive.
  11. Permittee presented substantial evidence contained within Exhibit 2 showing that the ATC has renewed other similarly situated permit holders notwithstanding violations of record for illegally possessing gaming devices.
  12. At no time during either of the hearings before the LB or on appeal did any remonstrators appear and object to the permit in this matter being renewed. (LB Hearing; ATC Hearing).

#### IV. CONCLUSIONS OF LAW

1. The Permittee, Fox Enterprises, Inc., d/b/a Las Vegas Lounge, 7023 Pendleton Pike, Indianapolis, Indiana 46226 (Permittee) is the holder of a type 210,

---

<sup>5</sup> (1982), Ind.App., 431 N.E.2d 823, at 830, 834, holding that the Commission may not delegate interpretation of its rules and regulations to local boards, but recognizing the importance of input from those boards in the licensing procedure.

Alcohol and Tobacco Commission (ATC) permit, permit #RR49-05552, originally issued on October 21, 1997, and renewed annually thereafter. (ATC File).

2. Permittee's record before the ATC, consisting of one (1) violation of record, does not, by itself, disqualify permittee from renewal of its permit.
3. The Marion County LB's action in denying renewal of said permit was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence.<sup>6</sup>
4. Denial of renewal of the permit based on the record in this case would be an excessive penalty not proportional to the offense committed.<sup>7</sup>
5. There was no compelling substantial evidence against the renewal of this permit at either the LB hearing or the ATC appeal hearing, and for the HJ to affirm the LB in this instance would not be supported by substantial evidence.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the finding of the LB to deny the renewal in this matter was not based on substantial evidence and must fail. And it is further ordered, adjudged, and decreed that the evidence adduced at the ATC appeal hearing was in favor of the Applicant and against the LB and the appeal of Permittee, Fox Enterprises, Inc., d/b/a Las Vegas Lounge, 7023 Pendleton Pike, Indianapolis, Indiana 46226 for renewal of this Type-110 permit, permit #RR49-05552, is granted and the renewal of said permit applied for is hereby granted.

DATED: \_\_\_\_\_

\_\_\_\_\_  
MARK C. WEBB, Hearing Judge

\_\_\_\_\_  
<sup>6</sup> (IC 7.1-3-19-11)

<sup>7</sup> That is not to say that repeated record violations of IC 35-45-5, *et seq.*, might not be sufficient under other circumstances to warrant nonrenewal of a permit. Permittee is urged to be mindful of 905 IAC 1-27-2, and the sanctions contained in IC 7.1-2-6-1 through IC 7.1-2-6-14.